cautious in so doing. Unless the case is entirely clear their interference would be usurpation.

In the present case there can be no question that the legislature decided wisely and well. This railroad will unquestionably develop lands now comparatively valueless, and add millions to the taxable capital of the State. A legislature can hardly go amiss on this point.

If, indeed, private corporations are to become unduly rich by running these roads; if the success of such companies in that business is so assured as that all risk of loss is gone; then it may be the duty of the State to limit their profits or otherwise curtail the privileges granted. But this is a matter for the legislature, not the courts. Unwise legislation is one thing, unconstitutional legislation is another.

S. T.

RECENT AMERICAN DECISIONS.

Supreme Court of Michigan.

CITY OF DETROIT *v.* BLAKEBY AND WIFE.

A municipal corporation is not liable, in a private action for damages, for injuries caused by neglect to keep its streets in repair.

The cases founded on mere neglect to repair, and on acts of positive misfeasance, reviewed and distinguished by CAMPBELL, C. J.

THIS was an action by defendants in error, against the city of Detroit, for damages received from the defective condition of a cross-walk. In the Wayne Circuit Court the defendants in error had a verdict and judgment, to which the city took this writ of error.

The opinion of the court was delivered by

CAMPBELL, C. J. The principal question in this case is whether the city of Detroit is liable to a private action of an injured party for neglect to keep a cross-walk in repair. The other questions involve an inquiry into the circumstances which would go to modify any such liability in the present case.

There has been but one case in this State decided by this court, where the claim for damages arose purely out of a neglect to repair. In *Dewey* v. *Detroit*, 15 Mich. 307, such a suit

was brought but it did not call for a decision upon the main question. In *Township of Niles* v. *Martin*, 4 Mich. 557, it was held there was no such liability in a township, and this case was followed by us at the present term in *Township of Leoni* v. *Taylor*. It was held in *Larkin* v. *Saginaw County*, 11 Mich. 88, that a county could not be sued for directing a bridge to be built on a plan that was defective and injurious. In *Pennoyer* v. *Saginaw City*, 8 Mich. 534, a city was held liable for continuing a private nuisance which it had created, and in *Corey* v. *Detroit*, 9 Mich. 165, the city of Detroit was held liable for an accident caused by leaving an excavation in a street for a sewer, imperfectly guarded. In *Delmont* v. *Detroit*, 4 Mich. 135, it was held the city was not liable for the flooding of a cellar by a sewer, into which it drained. None of those cases presented the precise question raised here, and we are required therefore to consider it as an original inquiry, except in so far as it may be affected by any principles involved in the cases already decided.

The streets of Detroit are public highways, designed like all other roads for the benefit of all people desiring to travel upon them. The duty or power of keeping them in proper condition is a public and not a private duty, and it is an office for the performance of which there is no compensation given to the city. Whatever liability exists to perform this service to the public, and to respond for any failure to perform it, must arise, if at all, from the implication that is claimed to exist in the nature of such a municipality.

There is a vague impression that municipalities are bound in all cases to answer in damages for all private injuries from defects in the public ways. But the law in this State and in most parts of the country rejects this as a general proposition, and confines the recovery to cases of grievances arising under peculiar circumstances. If there is any ground for recovery here, it is because Detroit is incorporated, and it depends therefore on the consideration whether there is anything in the nature of incorporated municipalities like this which should subject them to liabilities not enforced against towns and counties.

The cases which recognize the distinction apply it to villages and cities alike.

It has never been claimed that the violation of duty to the public was any more reprehensible in these corporations than outside of them; nor that there was any more justice in giving damages for an injury sustained in a city or village street, than for one sustained outside of the corporate bounds. The private suffering is the same and the official negligence may be the same. The reason, if it exists, is to be found in some other direction, and can only be tried by a comparison of some of the classes of authorities which have dealt with the subject in hand.

It has been held that corporations may be liable to suit for positive mischief produced by their active misconduct, and not by mere errors of judgment, and while the application of this rule may have been of doubtful correctness in some cases, the rule itself is at least intelligible and will cover many decisions. It was substantially upon this principle that the case of *Detroit* v. *Corey* was rested by the judges who concurred in the conclusion. *Thayer* v. *Boston*, 19 Pick. 511, was a case of this kind, involving a direct encroachment on private property. *Rochester White Lead Co.* v. *City of Rochester*, 3 N. Y. 465, where a natural water-course was narrowed and obstructed by a culvert entirely unfit for its purpose and not planned by a competent engineer, is put upon this ground in the decision of *Hickox* v. *Plattsburg*, cited 16 N. Y. 161; *Lee* v. *Village of Sandy Hill*, 40 N. Y. 422, involved a direct trespass.

The injuries involved in these New York and Massachusetts cases referred to, were not the result of public nuisances, but were purely private grievances. And in several cases cited on the argument the mischiefs complained of were altogether private. The distinction between these and public nuisances or neglects has not always been observed, and has led to some of the confusion which is found in the authorities. In all the cases involving injuries from obstructions to drainage, the grievance was a private nuisance. In case of *Mayor* v. *Furge*, 3 Hill 612, which has been generally treated as a leading case, the damage was caused by water backing up from sewers not

kept cleaned out as they should have been: *Barton* v. *Syracuse*, 36 N. Y. 54, involved similar questions as did also *Childs* v. *Boston*, 4 Allen 41. These cases do not harmonize with *Dermont* v. *Detroit*, 4 Mich. 135; but they rest on the assumption that having constructed the sewers voluntarily for private purposes, and not as a public duty, the obligation was complete to keep them from doing any mischief, as it would be in private persons. And in *Bailey* v. *Mayor*, 3 Hill 538; S. C. 2 Denio 433, the mischief was caused by the breaking away of a dam connected with the Croton water works, whereby the property of the plaintiff was destroyed. In this latter case the judgment rested entirely upon the theory that the city held the water works as a private franchise and possession, and subject to all the responsibilities of private ownership. The judges, who regarded it as a public work, held there was no liability. In *Conard* v. *Trustees of Ithaca*, 16 N. Y. 159, the facts were substantially like those in *Rochester White Lead Co.* v. *Rochester*, and the decision was rested on the principles of that case DENIO, C. J., who delivered the opinion of the court, stated his own opinion to be that there was no liability, but that he regarded the recent decision in another case referred to as establishing it, and in *Liverpool* v. *Freeholders of Camden*, 29 N. J. 245 (and on Error, 2 Vroom. 507), under a statute like that which was considered by this court in *Township of Leoni* v. *Taylor*, it was decided that while a passenger over a bridge could sue for injuries, yet where property adjacent was injured by the bridge, there was no remedy. Upon anything which sustains the liability for such grievances, however, it is manifest that the injury is not a public grievance in any sense, and does not involve a special private damage, from an act that t the same time effects injuriously the whole people.

Another class of injuries involves a public grievance specially injuring an individual, arising out of some neglect or misconduct in the management of some of those works which are held in N. Y., to concern the municipality in its private interests, and to be in the law the same as private enterprises. It is held, that in constructing sewers and similiar works, which can only be built by city direction, if the streets are broken up and inju-

ries happen because no adequate precautions are taken, the liability shall be enforced as springing from that carelessness, and not on the ground of non-repairs of highways. *Lloyd* v. *Mayor*, 5 N. Y. 369, and *Storrs* v. *Utica*, 17 N. Y. 104, were cases of this kind. In these cases, as in the case of *Detroit* v. *Corey*, the streets were held to have been broken up by direct agency of the city authorities, and the negligence which caused the injury was held to be negligence in doing a work requiring special care, or in other words, the wrong complained of was a misfeasance and not a mere omission. The case of *Weet* v. *Brockport*, 16 N. Y. 161, was also a case where SELDEN, J., who reviewed and discussed all the decisions, said it was not necessary to consider the wrong complained of as a mere neglect of duty, because it was in itself a dangerous public nuisance, created by the corporation, and not in any sense non-feasance. In *Delmonico* v. *Mayor*, 1 Sandf. 226, the injuries, though in a highway, consisted in crushing in a vault under the street, by improperly piling earth upon it while excavating for a sewer, and there was also a direct misfeasance.

The cases in which cities and villages have been held subject to suits for neglect of public duty, in not keeping highways in repair, where none of the other elements have been taken into the account, are not numerous, and all which quote any authority profess to rest especially upon the New York cases, except where the remedy is statutory. It will be proper therefore to notice what those cases are, and upon what cases they are supported. The only cases of this kind decided in the courts of last resort, that we have been able to find, are *Hutson* v. *Mayor*, 9 N. Y. 163; *Hickox* v. *Plattsburg*, 16 N. Y. 161, and *Davenport* v. *Ruckman*, 37 N. Y. 568. This latter case resembles the one before us very closely in its leading features, and would furnish a very close precedent. It is not reasoned out at all, but refers for the doctrine to the other two cases, and to an authority in 18 N. Y., which does not relate to municipal liabilities. The case of *Hutson* v. *Mayor*, does not attempt to find any distinct foundation for the right of action, but refers to the cases in 3 Hill, and *Rochester White Lead Co.* v. *Rochester*, and *Adsit* v. *Brady*, 4 Hill 630, as having established the liability.

This latter case is disapproved in *Weet* v. *Brockport*, and the others are sustained there on the ground of misfeasance, and as Judge DENIO, when the decisions in 16 New York were made, stated that he had not supposed there was any corporate liability for mere neglect to keep ways in repair, it is quite possible that the case of *Huston* v. *Mayor* was regarded as distinguishable. The circumstances were very aggravated, as it would seem that the city had left a road too narrow to accommodate a carriage, without any paving and without protection against the danger of falling down a deep embankment into a railroad excavation. The report is not as full as could be desired upon the precise state of facts. In the Supreme Court, where the judges differ in opinion (two dissenting), the liability seems, from the view taken of that case by Judge SELDEN, to have rested on the ground that there had been a breach of private duty and not of duty to the public. If this was the view actually taken, it would not bring the case within the same category with the other road cases. But the case of *Weet* v. *Brockport*, 16 New York 161, is recognized as the one in which the whole law has been finally settled, and it is upon the grounds there laid down that the liability is now fixed in New York. The elaborate opinion of Judge SELDEN, which was adopted by the Court of Appeals, denies the correctness of the dicta in some of the previous cases, and asserts the liability to an action solely upon the ground that the franchises granted to municipal corporations are in law a sufficient consideration for an implied promise to perform with fidelity all the duties imposed by the charter, and that the liability is the same as that which attaches against individuals who have franchises in ferries, toll bridges and the like. The principle as he states it is:

"That whenever an individual or a corporation, for a consideration received from the sovereign power, has become bound by covenant or agreement, either express or implied, to do certain things, such individual or corporation is liable, in case of neglect to perform such covenant, not only to a public prosecution by indictment, but to a private action at the suit of any person injured by such neglect. In all such cases the

contract made with the sovereign power is deemed to enure to the benefit of every individual interested in its performance."

In order to get at the true ground of liability, the opinion goes on to determine, first, whether townships and other public bodies, not being incorporated cities or villages, are liable, and shows conclusively that they are not, and the court arrives at this conclusion not on the basis of an absence of duty or an absence of means, but because their duties are duties to the public and not to individuals. Full citations are made from the English cases which were cited before us, and also from the American cases. The case of *Young* v. *Commissioner of Roads*, 2 N.& McC. 537, is cited approvingly, and the following language is quoted as expressing the correct idea: "When an officer has been appointed to act, not for the public in general, but for individuals in particular, and from each individual receives an equivalent for the services rendered him, he may be responsible in a private action for a neglect of duty, but when the officer acts for the public in general, the appropriate remedy for his neglect of duty is a public prosecution." In another part of the opinion, sheriffs are given as examples of the former and highway commissioners of the latter class of officers. The cases cited do not all require the consideration for the services to come immediately from individuals, but they all require the services to be due to individuals and not to the public, and to spring from contract. The English cases are reviewed in the *Mersey Dock Cases*, 1 H. of L. Cases N. S. 93; 1 H. & N. 493; 3 Id. 164, and exemplify this. Thus the liability to repair a sea-wall is in favor of those who own the property adjacent; the liability to keep docks safe of access in favor of those who have occasion to require their use upon the customary terms; the liability to keep toll-bridges safe in favor of those who use them. But there is no instance of liability where the public is interested directly, and in those cases where the obligation rests upon the consideration of corporate franchises, the duty has always been toward individuals, although the consideration moved from the State. The decisions upon this sustain the views of Judge SELDEN concerning his premises, but there is

some difficulty in reaching his conclusion through them. It is admitted everywhere, except in a single case in Maryland, that there is no common law liability against ordinary municipal corporations, such as towns or counties, and that they cannot be sued except by statute. It has also been uniformly held in New York as well as elsewhere, that public officers whose offices are created by act of the legislature, are in no sense municipal agents, and that their neglect is not to be regarded as the neglect of the municipality, and their misconduct is not chargeable against it unless it is authorized or ratified expressly or by implication. This doctrine has been applied to cities as well as to all other corporations. *Barney* v. *Lowell*, 98 Mass. 570; *White* v. *Philipston*, 10 Metc. 108; *Mower* v. *Leicester*, 9 Mass. 247; *Bigelow* v. *Randolph*, 14 Gray, 541; *Wolcott* v. *Swanscott*, 1 Allen 101; *Young* v. *Com'r of Roads*, 2 Nott & McCord 537; *Pack* v. *Mayor*, 4 Seld. 222; *Martin* v. *Mayor of Brooklyn*, 1 Hill 545; *Bartlett* v. *Crozier*, 17 J. R. 438; *Morey* v. *Newfane*, 8 Barb. 605; *Eastman* v. *Meredith*, 36 N. Y. 284; *Hyde* v. *Jamaica*, 27 Vt. 443; *Lorillard* v. *Town of Monroe*, 11 N Y 392; *Mitchell* v. *Rockland*, 52 Maine, 168—and the numerous cases which exonerate cities from liabilities for not enforcing their police laws so as to prevent damage, rest upon a very similar basis—*Howell* v. *Alexandria*, 3 Peters 398; *Levy* v. *Mayor*, Sandf. S. C. 465; *Proctor* v. *Lexington*, 13 B. Monroe 509; *Howe* v. *New Orleans*, 12 La. Ann. 481; *Western Reserve College* v. *Cleveland*, 12 Ohio St. 375; *Brinkmeyer* v. *Evansville*, 29 Ind. 187; *Griffin* v. *Mayor*, 9 N. Y. 456. In the case of *Eastman* v. *Meredith*, 36 N. H. 284, the distinction between the English and American municipal corporations is clearly defined. The former often hold special property and franchises of a profitable nature, which they have received upon conditions, and which they can hold by the same indefeasible right with individuals. But American municipalities hold their functions merely as governing agencies. They may own private property and transact business not strictly municipal, if allowed by law to do so, just as private parties may, and with the same liability; but their public functions are all held at sufferance, and their duties may be multiplied and enforced at the pleasure

of the legislature. They have no choice in the matter; they have no privileges which cannot be taken away, and they derive no profit from their care of the public ways, and the execution of their public functions. They differ from towns only in the extent of their powers and duties bestowed for public purposes, and their improvements are made by taxation, just as they are made on a smaller scale in towns and counties. In the case of *Bailey* v. *Mayor*, 3 Hill 538, it was intimated by Judge NELSON that the State could not compel the city to accept its charter, and in *Child* v. *Boston*, 4 Allen 41, the fact that the sewerage system had been left to vote and been accepted, was held to make it a private and not a public matter. The sewer cases have, in several instances, gone upon this latter notion. It is not necessary to discuss that question here, because streets are not private and because in this State at least no municipality can exercise any powers except by State permission, and every municipal charter is liable to be amended at pleasure. The charter of Detroit has undergone most radical changes. It is impossible to sustain the proposition that those charters rest on contract, and it is impossible, as Judge SELDEN demonstrates, to find any legal warrant for any other ground for distinguishing the liability of one municipal body from that of another. There is no basis or authority for any such distinction concerning the consideration on which their powers are granted, and it rests upon simple assertion; and yet the decision stands in New York as authority for all that is claimed here because, although in the case in which the opinion was given in the Supreme Court, it was not called for, yet in the case of *Hickox* v. *Trustees of Plattsburg*, 16 N. Y. 161, in which it was adopted as the opinion of the Court of Appeals, the mischief was a mere neglect of repair, when the street had been obstructed by an individual excavation for a short time.

It is impossible to harmonize the decision with the previous decisions exempting corporations from responsibility, because public officers were not their agents. It is no easier to sustain it in the face of the uniform decisions denying liability for failure to enforce their police regulations. The authorities which make corporations liable on the ground of conditions attached to

their franchises, go very far toward compelling them to respond as absolutely bound to prevent mischief, and the general reasoning on which most of the opinions rest, and the criticisms made upon former decisions—which it is asserted went altogether too far in creating liability—all are designed to show, and do show very forcibly, that simply as municipal corporations, apart from any contract theory, no public bodies can be made responsible for official neglect involving no active misfeasance.

There is no such distinction recognized in the law elsewhere. In *City of Providence* v. *Clapp*, 17 Howard 161, the United States Supreme Court, through Judge NELSON, held that cities and towns were alike in their responsibility and in their immunity. In *County officers of Anne Arundel* v. *Duckett*, 20 Md. 468, a county was held responsible to the fullest extent. In New Jersey in *Freeholders of Sussex* v. *Strader*, 3 Harrison 108; *County Freeholders of Essex*, 27 N. J. 415; *Livermore* v. *Freeholders of Camden*, 29 N. J. 245, and 2 Vroom 507, and *Pray* v. *Mayor of Jersey City*, 32 N. J. 394, the cases were all rested on the same principles, and cities were exonerated because towns and counties were. The suggestion of Judge SELDEN has been caught at by some courts since the decision, and has been carried to its legitimate results, as in *Jones* v. *New Haven* 34 Con. 1, where the damage was caused by a falling limb of a tree. But so far as we have seen, even the cases which are decided on this ground do not hold that towns do not receive their powers upon a consideration as well as cities. That question still remains to be handled in those courts.

It is utterly impossible to draw any rational distinction on any such grounds. It is competent for the legislature to give towns and counties powers as large as those granted to cities. Each receives what is supposed to be necessary or convenient, and each receives this, because the good government of the people is supposed to require it. It would be contrary to every principle of fairness to give special privileges to any part of the people and deny them to others, and such is not the purpose of city charters. In England the burgess of boroughs and cities have very important and valuable privileges of an exclusive nature and not common to all the people of the realm. Their char-

ters are grants of privilege and not mere government agencies Their free customs and liberties were put by the great charter under the same immunity with private freeholds. But in this State and in this country generally they are not placed beyond legislative control. The Dartmouth College case, which first established charters as contracts, distinguished between public and private corporations, and there is no respectable authority to be found anywhere which holds that either offices or municipal charters generally involve any rights of property whatever. They are all created for public uses and subject to public control.

We think that it will require legislative action to create any liability to private suit for non-repairs of public ways. Whether such responsibility should be created, and to what extent and under what circumstances it should be enforced, are legislative questions of importance and some nicety. They cannot be solved by courts.

Judgment reversed.

COOLEY, J., dissented.

The foregoing case is one that cannot fail to be of interest to the profession, inasmuch as it concerns an important question affecting a great number of our municipalities to a very large extent, and is, at the same time, a departure from the doctrines, which have been supposed to have been adopted by the English courts and those of some of the American States. The question is by no means free from difficulty; and we cannot fairly say that we have been able to devote sufficient time to an examination and analysis of the cases bearing upon the point, to enable us to speak confidently of the exact weight of authority against the decision here made. There seems to be no question whatever, that the New York courts have adopted a rule upon the subject more in conformity with the dissenting opinion in this case than with that of the majority. In *Davenport* v. *Ruckman*, 37 N. Y. 568, the rule is thus stated: When the streets or sidewalks of the city of New York are out of repair through the neglect of the corporation, it is liable to an action for such neglect, at the suit of the person injured, whether the injury arises from some act done by the corporation, or from an omission of duty of their part. And the same doctrine is found in numerous earlier decisions in that State, most of which are referred to in the opinion in the case under review. The rule is thus stated is a late case in the Supreme Court of New York: "Whatever may be the case in regard to commissioners of highways in towns, a different and more stringent rule appears to have been applied to corporations and the trustees of a village": *Hyatt* v. *The Trustees of the Village of Rondout*, 44 Barb. 385.

And in *Wendell* v. *The City of Troy*, 4 Keyes, N. Y. Court of Appeals 261 the city was held responsible for an injury to the plaintiff by means of the defective construction of a drain under the street, whereby it caved in, although built by a private person for his own convenience by permission of the city authorities. The New York cases seem to go the full length of making cities and villages responsible for all damage caused by any failure to perform the duties imposed by their charters, on the ground that having sought special acts of incorporation they are bound, as corporations, to the performance of all the duties imposed by such charters, as conditions voluntarily assumed by the corporations, impliedly at least, by reason of the acceptance of the charters containing such conditions. And the case of *Jones* v. *The City of New Haven*, 34 Conn. 1, seems to go much upon the same ground, except that there the matter came specially under one of their own by-laws, in regard to which there might seem to be less question than if the duty had been imposed by the legislature as a public duty or burden.

The general doctrine that a public officer is not responsible for the misconduct of his subordinates, although his appointees, has been recognized from an early day: *Lane* v. *Cotton*, 1 Ld. Ray 646, where the action was against the postmaster general for the default of his deputies. The case of the *Mayor of Lyme Regis* v. *Henley*, 3 B. & Ad. 77; S. C 2 Cl. & Fin. 331, was an action for injury to the defendant's land by reason of the plaintiffs failing to repair certain sea walls appertaining to their municipality, and which the condition of their charter obliged them to maintain and keep in repair. The case was first decided by the Common Pleas, in favor of the present defendant, 5 Bing. 9, and came for hearing on writ of error in the King's Bench. LORD TENTERDEN, Ch, J., gave judgment for the defendant, upon the ground that the corporation by accepting its charter became bound to perform all its conditions, and whoever suffered damage through any default in that respect may have an action and the public may have redress for such defaults by indictment.

The subject has been more or less considered by the English courts since that time; but the case of the *Mersey Docks* v. *Gibbs*, and the same v. *Penhallow*, 1 H. Lds. Cases, N. S., 93—128; S. C., 1 H. & N. 439; 3 id. 164, seems to have put the question at rest there, so far as the points involved in the latter case are concerned. The injury complained of here occurred by reason of the docks being out of repair. The plaintiffs are a public corporation, created for the purpose of maintaining the harbor of Liverpool, and are required to maintain and keep in repair suitable docks and other harbor accommodations, for the use of which they are authorized to demand certain dues, which are intended to maintain the works, and are to be lessened whenever they produce more than is required for that purpose. The Court of Exchequer gave judgment in favor of the corporation, on the authority of *Metcalfe* v. *Hetherington*, 11 Exch. 258; but this judgment was reversed in the Exchequer Chamber; 3 H. & N. 164, and the judgment of the Exchequer Chamber affirmed in the House of Lords. The case of Gibbs was heard on demurrer to the declaration which contained the averment that the com-

pany knowing that the dock and its entrance was, by reason of accumulation of mud, unfit to be used by ships, did not take due and reasonable or any care to put it in a fit state, but negligently suffered the dock to remain in such unfit state, whilst, as they well knew, it was used by vessels, and that the damages arose in consequence.

The case in the Exchequer Chamber seems to have been decided upon the general ground that a corporation created for the purpose of maintaining public works, and receiving tolls or dues for the use of the same, is bound to see that such works are kept in a safe and fit condition for public use. This decision went upon the authority of *The Lancaster Canal Co.* v. *Parnaby*, 11 Ad. & El. 223, 242. And it was here considered that it made no difference whether the tolls were reserved for the benefit of the shareholders, as in the last case cited, or in a fiduciary capacity, as in the present case. And the house of Lords seem to have decided the case upon this view. Lord CRANWORTH, chancellor, said the destruction was one that could be held to affect the rights of those using the docks. Lord WENSLEYDALE said, if the question were *res integra*, and not settled by authority, he would be inclined to hold that it came within the principle of the cases where public officers have been held not liable to a private action for neglect of duty by servants appointed by them. But upon the former decisions he held the judgment below must be affirmed. And Lord WESTBURY fully concurred with the Lord Chancellor.

And it seems to us that this case is in itself no sufficient authority for holding cities and villages any more responsible for their streets and sidewalks being out of repair than are towns or counties, upon whom the duty of keeping highways in repair is imposed, where it has long been settled there is no responsibility for injuries occurring by want of repairs, unless imposed by statute. But the earlier English cases held a more stringent rule of responsibility in regard to cities and villages having special acts of incorporation, and chiefly upon the ground that they had accepted them voluntarily, and thus assumed the duties imposed by the charters thus accepted. How far this distinction is well-founded it will not be altogether decisive of the question to inquire. For since it has been long settled that such corporations are so responsible, it might not be entirely just to the public to now declare their irresponsibility, when, but for the rule of responsibility already established, the legislature might have provided for such responsibility by special enactments, as in the case of towns. For while it may be reasoned with great plausibility that there is no good reason, aside from the former decisions, to hold cities and villages to any higher degree of responsibility in regard to damages occurring by reason of their highways being out of repair, than towns are held, it may at the same time be urged with great propriety that they should be held to the same responsibility. But under the decision here made they could not be so held in most of the States. Since the legislatures have omitted in most cases, it is fair to presume, to impose the same duty by statutes upon cities and villages, which they do upon towns, on the ground that it is not required by reason of the general principles of the law having already imposed that duty

upon them, this consideration will tend to show that the restoration of the law to symmetry in this particular will more conveniently come from the legislature than from the courts. Beyond this it does not occur to us that any very convincing argument can fairly be urged against the decision of the court in this case. It cannot, we think, as a general rule, be justly held that towns are any less responsible for the consequences of leaving the highway in an unsafe condition than cities and villages are. If it requires a special statutory enactment to impose any such responsibility upon towns, we do not, upon general principles, very well comprehend why it should not require the same in the case of cities and villages. Our only doubt would be whether the symmetry of the law upon this point might not better be restored by the legislature.

L. F. R.

Court of Errors and Appeals of Mississippi.

PATRICK DEEVER *v.* THE STEAMER HOPE.

State legislatures have no authority to create maritime liens or confer jurisdiction on the State courts to enforce such liens by proceedings *in rem*. Such jurisdiction is exclusively in the Courts of Admiralty of the United States.

Suit was brought against a vessel by name, and the vessel attached under the water craft laws of Mississippi, for a debt due plaintiff. Plaintiff made affidavit that defendant was a steamer in the navigable waters of the State and in his declaration set forth that he was a citizen of Mississippi, and that the "home port" of the vessel was in that State: *Held*, that the court had no jurisdiction, the cause being one of admiralty.

THIS was an attachment issued by the plaintiff against the defendant, under the provisions of the act, entitled "An Act to provide a remedy by attachment against ships, steamboats, and other water crafts," chapter 53 of rev. code, p. 383.

Plaintiff made the affidavit required by article 2 of said act, in which he stated that "the steamboat Hope, a steamer in the navigable waters of this State" was indebted to him in the sum of $399.15, and also executed the requisite bond under the provisions of article 2, and the attachment was sued out, and made returnable to the Circuit Court of Yazoo county; the sheriff attached certain furniture and other chattels, in and belonging to the boat, which were replevied by Thomas Metzler, the captain of the steamer, under article 3 of the act.

At the return term, the plaintiff filed his declaration on the

account stated to be due him by the boat, stating that he was a citizen of the State of Mississippi, and that "home port of the said defendant (the steamer Hope) is in this State," and that the owners of said boat reside in Mississippi; and further alleged, that the cause for action was for work and labor performed by plaintiff upon said boat in repairing the same.

The defendant pleaded to the jurisdiction of the court, alleging that the defendant was a vessel navigating the Yazoo and Mississippi rivers, which are navigable from the sea by vessels of ten tons burden; and that the demand of the plaintiff, if any, is cognizable in the District Court of the United States, which has exclusive jurisdiction of all civil causes of admiralty and maritime jurisdiction, when seizures are made in waters which are navigable from the sea by vessels of ten tons burden. To this plea there was a demurrer which was overruled, and the plaintiff declining to reply, judgment final was rendered for the defendant, and this writ of error was taken to that judgment.

The errors assigned were, that the court erred in overruling the demurrer, and in rendering judgment for the defendant.

The opinion of the court was delivered by

SHACKELFORD, J.—The only question for our consideration in this case is, whether the Circuit Court of Yazoo county had jurisdiction of the subject-matter of the action. The objection to the jurisdiction is that the case as developed by the pleadings, was one exclusively of admiralty jurisdiction for the District Court of the United States, for the District of Mississippi. Counsel for the defendant in error in support of this proposition refer us to the decisions of the Supreme Court of the United States in the cases of *The Moses Taylor*, 4 Wal. 411, and *The Hein* v. *Trevor*, Id. 555.

On the other hand, counsel for plaintiff in error cite the cases of *Allen* v. *Newbury*, 21 How. 244; and *McGuire* v. *Cord*, Id. 248, as conclusive in favor of the jurisdiction of the Circuit Court below, and insists that unless the plea of the defendant in error contained an allegation that the steamer Hope was engaged in the *inter State trade* that the demurrer should have been sustained.

The affidavit of plaintiff in error asking for the attachment

issued in the case under consideration only contained an allegation that the steamer Hope was indebted to him in the sum of $339.15, and that the vessel "was in the navigable waters of the State of Mississippi."

The authority for the proceedings in this case is article 1 of the "Water Craft" law above referred to, which provides, that "when any person shall have any cause of action against the owner, captain, master, supercargo, or other person in charge of any ship, brig, sloop, steamboat, etc., in any navigable waters of the State, or navigating the rivers or seas in or adjacent to this State, for or on account of any such water craft, or the business in which said craft may be employed, it shall be lawful to prosecute the same against such water craft by the name thereof, or by such description as will enable the officer executing the writ to identify the same."

This statute gives the remedy to a creditor, whether the boat is engaged in trade exclusively between ports in the same State, or ports in different States.

The plaintiff in his declaration alleges that the home port of the steamer Hope is in the State of Mississippi; this allegation is equivalent to an allegation that the owners reside in the State, and nothing more, although counsel seems to consider it as sufficient to give the court jurisdiction, as the allegation was intended to show that the steamer was engaged exclusively in domestic trade, or trade and navigation between ports in the State and on waters entirely within the State.

This is an inference which we think cannot be legitimately drawn from the facts set forth in the affidavit and declaration of plaintiff in error.

If the jurisdiction of the court depended upon the fact that the steamer was engaged exclusively in trade within and upon the waters of the State, this the affidavit of plaintiff in error should have shown. Because the Yazoo river is a navigable stream entirely within the State, it does not follow that she was engaged in trade and navigation upon said river, or that the terminus of her trips were ports in this State.

It is evident from the affidavit of plaintiff in error that he relied upon the provisions of article 1 of the statute above

referred to, for the legality of his proceedings, without reference to the trade she was engaged in.

Unless the jurisdiction of the court can be sustained under the affidavit of plaintiff in error and the provisions of art. 1 of the act in question, the allegation in the declaration, that the "home port" of the defendant in error is in this State, could not strengthen his case or give the court jurisdiction, if it had been at the commencement of his suit. We are therefore to consider the question of jurisdiction solely upon the allegation in the affidavit of plaintiff in error in connection with the provisions of article 1 of the statute above quoted.

In the case of *Allen* v. *Newbury*, the Supreme Court of the United States held that a contract of affreightment between ports and places within the same State, was not the subject of admiralty jurisdiction, as it concerned purely the internal State trade, and that the jurisdiction belonged to the courts of the State. This doctrine was affirmed at the same term of the court in the case *McGuire* v. *Cord*

The doctrine announced in these cases cannot be applied to the case under consideration. If it were true that the defendant in error was engaged exclusively in the domestic trade, or between ports in this State, the doctrine in these cases has been overruled in the case of *The Belfast*, 7 Wallace 624.

In the opinion delivered by Justice CLIFFORD in that case, the case of *Allen* v. *Newbury* is reviewed. He says: "Remarks, it is conceded, are found in the opinion of the court in the case of *Allen* v. *Newbury*, inconsistent with these views, but they were not necessary to that decision, as the contract in that case was for the transportation of goods on one of the Western Lakes, when the jurisdiction in admiralty is restricted by an act of Congress to steamboats and other vessels employed in the business of commerce and navigation between ports and places in different States and Territories," referring to *The Hein* v. *Trevor*, 4 Wallace 555.

In the case of *The Belfast*, the owner of the Belfast excepted to the jurisdiction of the Circuit Court of the State of Alabama, and alleged that the steamer, at the time the cotton was shipped, was duly enrolled and licensed under the laws of the United

States; that she was then and there engaged in commerce and navigation between the city of Columbus, in the State of Mississippi, and the city of Mobile, in the State of Alabama, and that the cotton described in the libel was lost on her trip from the former city to the point of destination.

The cotton was shipped from a port in the State of Alabama to the city of Mobile, in one of the shipments mentioned in the libel, but all the cases were to be decided together. The counsel for the libelants contended that, inasmuch as the cotton was shipped in one of the cases from ports in the same State, the State court had jurisdiction of that case, impliedly admitting the jurisdiction of the court would not attach, if the cotton had been shipped from a port in a different State, to the city of Mobile.

The court, after an elaborate review of most of the decisions of the Supreme Court of the United States, involving questions of jurisdiction in case of admiralty, held that the State court in Alabama had no jurisdiction of those cases, including the one where the cotton was shipped in Alabama, and that the exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction is, by the terms of the ninth section of the judiciary act of 1789, conferred upon the District Courts of the United States, saving to the suitors in all cases, the right of a common law remedy, when the common law is competent to give it. Nothing is said about concurrent jurisdiction in a State court, or any other court.

Counsel for plaintiff in error insists that the plea of defendant in error does not contain the necessary allegations to oust the Circuit Court of jurisdiction. It was incumbent upon the plaintiff in error to show by the proceedings in his cause that the court had jurisdiction. If the court had no cognizance of the subject-matter of the action, and it was one for the admiralty jurisdiction of the District Court of the United States, it was not necessary for the defendant in error to file a plea to the jurisdiction, or any other plea, showing reasons why the case should be dismissed. That could have been done on motion of counsel, or even upon the motion of the court *ex officio*: 8 Mass. Rep. 87; 12 Id. 367, and cases cited.

Another view taken of this point by counsel for plaintiff in error is, that "material men, furnishers of supplies, repairs, etc., have no maritime lien on a vessel so supplied in her home port; and further, that a vessel engaged exclusively in the *domestic commerce of a State*, although plying in public navigable waters, is not within the admiralty jurisdiction of the United States, and contracts made with her. or her, owners or officers, are not maritime contracts."

The first branch of this proposition is correct, but material men who furnish materials or supplies for a vessel in a foreign port, or in a port other than a port of the State where the vessel belongs, have a maritime lien on the vessel as a security for the payment of the price of all such materials and supplies.

They have such a lien, because upon the principles of the maritime law, such materials and supplies are presumed to be furnished on the credit of the vessel and consequently they are entitled to proceed *in rem*, in the Admiralty Court to enforce the lien: *The General Smith*, 4 Wheaton, 437; *The Belfast*, 7 Wallace, 624.

The second branch of the proposition of counsel, we have already shown to be untenable.

The record does not disclose, that the cause of action, the subject-matter of the attachment, was or was not created or contracted with the owners of the defendant in error at the alleged "home port" of the vessel. There is nothing to show where the indebtedness accrued.

The home port of the defendant in error, at the time of the creation of the indebtedness sued on, might have been in any other State, nothing in the record appearing to the contrary.

The allegation of the plaintiff in error, in his declaration relative to the "home port" of the defendant in error, only applied to the status of the parties at the time of filing the declaration. The record does not disclose any fact tending to establish the presumption raised by counsel, that the contract for labor and materials furnished was performed or executed at the "home port" of the defendant in error where she was attached.

Shipwrights who have taken a vessel into their possession to repair, if a domestic one, or have worked upon it without retaining it in their possession as a security for their claims and let it pass out out of their possession, have no claim or lien upon the ship unless given by statute: *The General Smith*, 4 Wheat. 438.

There being no statute in this State creating a *specific lien* upon vessels for labor performed or materials furnished by shipwrights or material men at the "home port" of vessels, if they permit them to pass out of their possession without getting their pay, they have to resort to their common law remedy.

The plaintiff should have pursued his common law remedy against the owners of the steamer, if he had performed the labor and furnished materials for the boat at her "home port" in this State; the owners of defendant being residents of the State at the time the plaintiff sued out his attachment.

State legislatures have no authority to create a maritime lien, nor can they confer any jurisdiction upon a court to enforce such lien, by suit or proceeding *in rem* as practiced in the Admiralty Courts of the United States.

The jurisdiction conferred by the act of 1789, on the District Courts of the United States in civil causes of admiralty and maritime jurisdiction, is exclusive by express terms, and this exclusion extends to State courts: *The Moses Taylor*, 4 Wallace 411; *Hein* v. *Trevor*, 4 Wallace 555; *The Belfast*, 7 Wallace 624.

The subject-matter of the controvery in the case before us, being within the admiralty and maritime jurisdiction of the District Courts of the United States, it necessarily follows, that the court below has no jurisdiction of the case as prosecuted by plaintiff, the proceedings being purely *in rem*, and in the nature and with the incidents of a suit in admiralty.

For these reasons, we think the court did not err in overruling the demurrer, and the judgment is affirmed.

Superior Court of Montgomery County, Ohio.

HENRY WESTERMAN *v.* ELIZABETH WESTERMAN, *et al.*

The statutes of Ohio, in relation to the property of married women, have in effect put such property, during coverture, in the position of property limited by a deed of trust to the sole and separate use of the wife, and where there is no express trust, the husband will be treated as a trustee.

The husband's curtesy is not entirely and in all cases destroyed, but exists as an estate contingent upon circumstances prescribed by the statutes.

Therefore, the common law rule that a secret conveyance of her realty by a woman under contemplation of marriage, is fraudulent and void against the husband, is not entirely destroyed by the statutes.

A woman just before marriage conveyed land to her children by a former marriage. The land was not fully paid for by her at the time of the conveyance, and her grantor subsequently obtained judgment against her and her husband for the balance of the purchase-money, which the husband was compelled to pay. *Held*, 1. That the husband having paid the judgment out of his own money, was entitled to be subrogated to the vendor's lien against the land, and could enforce the repayment of his money by sale of the land. 2. That the conveyance to the children was fraudulent as to the husband, and must be set aside.

THIS was a petition in equity by complainant, Henry Westerman against his wife, Elizabeth, and John and Joseph O'Neil.

The petition charged, that before the marriage of Henry Westerman to Elizabeth O'Neil, which took place September 16, 1867, Elizabeth had purchased a tract of land of one Roop, and was indebted to him thereof at the time of marriage in the sum of $540; that pending the treaty of marriage, and while in contemplation of marriage with Henry, without his knowledge, and for the purpose of defrauding him, she conveyed said land without valuable consideration to her children by a former marriage, John and Joseph O'Neil, and that Henry remained ignorant of this conveyance until after the marriage; that after the marriage Roop sued and obtained judgment against Henry and Elizabeth, his wife, on said indebtedness, and caused an execution to issue and be levied on the property of Henry Westerman, and that to save his property from sale on execution, Henry paid the judgment. The petition also averred that Elizabeth had, ever since the marriage, been the owner in her own separate right, of other real and personal property and choses in action. Petitioner prayed that the conveyance

to John and Joseph O'Niel might be set aside as fraudulent, and that said real estate so conveyed might be sold to pay said debt.

The defendant, Elizabeth Westerman, demurred to the petition.

C. L. Vallandigham for plaintiff.

Craighead & Munger for defendants.

The opinion of the court was delivered by

JORDAN, J.—The first question to be considered is, whether Henry is entitled to have said land sold to pay said debt, and secondly, whether this conveyance shall be set aside?

In determining this first question, it is necessary to consider the change our statutes have wrought, in the relation that husband and wife sustain to each other in regard to property.

By the common law marriage merged the wife in her husband, and invested him immediately with all the money and personal property of which she was possessed, and with the right to reduce to possession, and become the owner of all her personal property, and choses in action of which she was not possessed, and also with usufruct of her real estate during life, and curtesy after her death, and he became liable for her debts contracted before marriage.

If, however, the property was limited to the sole and separate use of the wife, by the deed or devise under which she held title, and no trustee were appointed, the husband became the trustee of the wife.

The reason assigned by the common law judges why the wife's property vests in the husband by marriage is because by marriage she becomes one with him, and loses her personal identity. And the reason assigned why he becomes liable for her debts is, because having lost the means of payment by her property vesting in her husband, she might be imprisoned for the debt, and unless the husband was made liable for the debt, and also liable to imprisonment, he might suffer her to remain imprisoned, while he held her property, which, otherwise, would have served to effect her release, and by making him also reliable, a guaranty of her release was secured. It is not placed on

the principle that he has received her property, for he became liable whether he acquired property by the marriage or not.

Our statutes have wrought great changes in the marital relation. Imprisonment for debt has been abolished, except in cases of fraud. The statute of 1861 and the amendment thereof of 1866 exclude the husband from all right to the wife's property and choses in action, except curtesy, and specifically provide that the wife's property shall be her sole and separate property and under her own control. and shall be liable for the payment of her debts contracted before marriage. Yet, notwithstanding, the husband is excluded from all participation in his wife's property, and she retains it as her separate property, and her debts before marriage are made a charge upon it, and she cannot be embarrassed by imprisonment—in fact, although all the reasons that made the husband liable for the debts of the wife incurred before marriage have disappeared, yet the husband remains liable to an action for such debts.

The statute of Pennsylvania, of 1848, which is similar to our statutes of 1861 and 1866, goes one step further, and exempts the husband from all liability for such debts of his wife, contracted before marriage, while our statute still leaves him liable. The effect of this statute is to limit all the wife's property to her sole and separate use, with all the incidents of property limited to her sole and separate use by deed or devise before its passage. Such was held to be the effect of the Pennsylvania Statute of 1848, in *Bear* v. *Bear*, 33 Penn. St. R. 525.

This court has repeatedly so held in requiring actions to be brought by a married woman by her next friend, under the section of the code which requires actions concerning her separate estate to be so brought.

One of the incidents of a separate estate in the wife is a trustee to hold the legal title in trust for her, while she retained the sole control of it: Reeve Dom. Rel. 162; Tyler on In. and Cov. 431. And where no trustee was appointed, equity would consider the husband her trustee: Tyler on In. and Cov. 441; Story on Equity 1380. The necessity for a trustee existed in the fact that by marrying the wife lost her identity in the husband: Tyler on In. and Cov. 435. And courts of equity

required him to hold the legal title thus cast upon him in trust for her.

Now, with these changes in the law, we find Roop holds a claim against Elizabeth O'Niel for $540, for purchase-money of a tract of land sold her in 1865. This claim was secured to him by a vendor's lien. Until this purchase-money was paid she held the legal title to the land in trust for Roop. With this indebtedness and this incumbrance on her land, she marries Henry Westerman in 1867, by which the legal title to all her real and personal property and choses in action, is vested in him in trust to hold for her sole and separate use charged with this debt, and she remains personally liable to a judgment therefor. By this marriage, Henry Westerman is also made liable for this debt. The law does not transfer the indebtedness to him, for his liability ceases on the termination of the marital relation. His executor is not liable. The law simply makes him collaterally liable—arbitrarily, and for a purpose and upon a principle that is now without any foundation: Reeves, Dem. Rel. 68. Under legal compulsion he pays the debt—uses *his* money to pay the purchase-money of her land. Or assuming the legal title to have vested in John and Joseph O'Niel by voluntary gift from Elizabeth, being grantees without consideration, they take it charged with the vendor's lien, and with the liability the statute imposes upon her property to pay her debts, and they hold it in trust for that purpose.

The payment by the husband, under such circumstances, does not raise a presumption, or rather repels the presumption that it was a gift. And to say that the husband shall pay this debt simply because his marriage made him collaterally liable, out of his own funds, and thereby rid the land of the incumbrance, pay the purchase-money of the land and have the title vest in John and Joseph O'Niel, without any redress, would be inequitable and unjust. I think that standing in the relation of trustee, holding technically the legal title in trust for her, and having paid a lien on her land now in the hands of purchasers without consideration, land made previously liable by the statute for the payment of the debt, and having by this payment used his own money to pay for land, the title

of which vested in others, equity subrogates him to the rights that Roop had, and charges the land in the hands of John and Joseph, the present holders of the legal title, for the payment of this debt. And to the extent that the title in John and Joseph may interfere with the sale of the land for that purpose the conveyance should be set aside.

It is settled, I think, beyond question, that a conveyance of her property by the wife before marriage, pending a treaty of marriage, and in contemplation of marriage, and especially if done fraudulently as averred in this petition, ought to be set aside. The husband's curtesy was such an interest as to make it a fraud upon him to convey it away. The statute of 1869 is relied upon as taking away any interest the husband had in this property after his wife's death. I think the husband's curtesy was such a vested interest as to bring it within the rule in *Jenney* v. *Gray*, 5 Ohio State Reports 45; but whether it does or not, I find the statute deprives the husband of curtesy only on condition that she dies, leaving children by a former marriage. This may never occur. If her children die before she does, then he has curtesy, and in the light of this statute he has a contingent curtesy in this land. I have examined the authorities referred to by counsel, but I find nothing to interfere with this conclusion. The demurrer is overruled.

United States Circuit Court, District of Missouri.

MARTIN, ASSSGNEE, ETC., *v.* SMITH ET AL.

Unless Congress has otherwise provided, State statutes of limitation are applied to controversies in the courts of the United States.

The fraud which in equity will prevent the running of the statute of limitations, is that which is secret or concealed, or distinguished from that which is open, visible or known, and a secret or concealed fraud is in equity a fraudulent concealment of the cause of action.

Even in cases of fraud, the statute will in equity begin to run as against the plaintiff when he has knowledge or information of facts which reasonably creates the belief that the transfer is fraudulent and can be proved to be so, and if, under all the circumstances, the plaintiff has been guilty of negligence

In discovering or attacking the fraud, the statute will begin to operate against him from the period his laches commenced.

What, in the view of a court of equity, will be regarded as a *discovery* of the fraud considered.

The statute of Missouri, which provides that "actions for relief on the ground of fraud must be brought within five years after the cause of action accrued, but the cause of action shall be deemed not to have accrued until the discovery by the aggrieved party at any time within ten years of the facts constituting the fraud," construed and considered as in substance enacting the equity rule on the same subject, and fixing the period of limitation.

In an action by an assignee in bankruptcy of a fraudulent debtor, where the fraud was *continuous*, and the debtor remained down to the time suit was brought, the real owner of the property sought to be recovered and in possession of it: *Held*, that the statute did not bar the suit, even though the initial fraudulent transaction took place more than five years before suit was commenced.

THIS was a bill in equity filed originally in the District Court by Martin, as assignee in bankruptcy of one Edward K. Woodward, to recover certain property from the defendants.

Prior to February, 1861, Woodward had been a merchant in St. Louis, doing business in his own name and in the usual way. In the fall of 1860, however, he became much embarrassed, and, in fact, insolvent. He endeavored late in 1860, first through the defendant, Gray, and subsequently through the defendant, Smith, to effect a compromise with his eastern creditors, but could not succeed. The defendant, Smith, is a brother-in-law of Woodward, is by profession an attorney-at-law, and resides in Hartford, Connecticut.

On the 8th December, 1861, Woodward, at St. Louis, wrote to Smith, at Hartford, informing him that suits were already begun against him, entreating him to go to New York and Philadelphia to see if he could not effect the desired compromise and extension. Woodward's letter then continues: "Make the best arrangement possible, except cash down or security; and if you cannot arrange with them, come right on here and buy me out on terms that you will be safe in, and such as they will be forced to accept our terms. One suit is within the justice's jurisdiction, and judgment will be rendered on the 10th, so I want something done previous to that time. The trial of the other two is set for the 17th. I shall call for a witness who, I don't believe, will be got at the time, and the proba-

bility is that they will be continued for the present. My real estate is in a precarious condition, and unless you can get those creditors into the arrangement, so as to give me time to protect it, everything will be swallowed up, unless you can come out, etc. * * I shall be anxious to hear from you."

Smith failed to make any compromise, but he effected a purchase of certain claims against Woodward at twenty-five cents on the dollar; went to St. Louis February, 1861, and on the 5th of that month purchased of Woodward his stock of merchandise, for the expressed consideration of $11,360.

This sum was paid by turning over to Woodward, at their face value, the claims which Smith had purchased a few days before at one-fourth of that sum; by assuming amounts due for the rent of the store building, and by his three notes to Woodward for $919.64 each.

These notes were soon afterward paid to Woodward in claims which Smith purchased of Woodward's creditors at twenty-five cents on the dollar, and then sent to St. Louis and turned over to Woodward at their par or nominal value, and the notes for rent were paid out of proceeds of goods sold from the store.

After the sale of the goods to Smith, the store was operated in the name of Bailey, agent, for over a year; then in the name of Bell, agent, until March, 1846, when a limited partnership was formed under the statute of Missouri, the articles being executed by the defendants, Gray and Smith—the former being the general and the latter the special partner. This limited partnership was by its terms to continue for three years from March 1, 1864, and the business was to be conducted in the name of Gray. When the three years expired the same arrangement was continued, and the store was being thus conducted in December, 1867, when Woodward was, on his own petition, adjudicated a bankrupt, and in July, 1868, when the present suit was commenced.

On the 22d April, 1868, Woodward, without beforehand consulting Smith, made to him, subject to certain incumbrances, a deed of all his real estate, and this deed was placed on record in February, 1862. Among other parcels was the house in which Woodward then lived, and where he has ever since re

sided, without paying rent therefor, and the taxes on which have been paid by Woodward out of money from the store. Certain parcels were redeemed by Woodward's direction from judicial sales, by money likewise taken from the store, and titles made in the name of Smith, of which he was subsequently advised. From the store also, and under Woodward's management, encumbrances have been paid off and the items have been assigned to Smith, who holds them against the property. [See *Robb* v. *Woodward*, Sup. Ct. Mo., March term, 1870.]

Soon after the purchase of the goods, Smith returned to Connecticut, leaving the store in the nominal possession of one Bailey as his agent, and taking with him of the moneys in the store the sum of $37 to pay his expenses. In the professed capacity of clerk for Smith, Woodward remained in the store from the time of his sale to Smith, in February, 1861, down to the time of the filing of the present bill, and the evidence showed that, in fact, he managed there as before, and that Bailey and Bell, and even Gray, acted under his direction.

The bill made Smith, Woodward and Gray defendants, and set out at great length all of the above-mentioned facts, with many others, and charged a fraudulent combination throughout all these transactions between Smith and Woodward to defraud the creditors of the latter; that the sale of the goods was colorable and fraudulent; that in reality Woodward was the real owner during all the time the business was conducted in the name of "Bailey, agent," and in the name of "Bell, agent," and in the name of Gray; that the real partner of Gray is Woodward, and not Smith; that Smith has been refunded out of the sales from the store all moneys which he has expended in the purchase of claims against Woodward, or for advances to purchase goods.

The bill also alleged that Woodward, in pursuance of the original fraudulent design, procured to be effected the limited partnership with Gray, who was to contribute $6,000 in cash against the stock, which was put at $12,000, and Gray was to be interested in one-third of the profits and Woodward in two-thirds, but to carry out the fraud, Smith's name was used in the articles, and not Woodward's. The bill stated that large

profits had been made; that the stock increased in value, that Woodward, at the date of his bankruptcy, was entitled to a large sum from the firm; that Gray had withdrawn large sums and amounts, and was indebted to his co-partner, Woodward, therefor; that the defendants Smith & Gray had a large amount of property belonging to the firm, which they had sold since the bankruptcy of Woodward was declared.

The bill also stated that the assignee, after his appointment in January, 1868, first discovered the frauds aforesaid; that claims to the amount of about $13,000 had been established against the estate of Woodward, by various creditors named, none of whom, it was averred, knew of the frauds complained of until January 3, 1867.

It was also averred that Smith & Gray denied that Woodward had any interest in the firm, and it was stated that the latter had falsely returned to the Bankrupt Court that he had no interest therein.

The prayer of the bill was that an account be taken of all the said partnership dealings between the defendants; that what should be found due from Smith & Gray to the firm be decreed to be paid to the complainant as assignee; that the respective rights of the defendants in the firm property, at the date of Woodward's bankruptcy, be determined; that a receiver be appointed to collect the debts and take charge of the property of the partnership; that the property be sold and converted into money, and for general relief.

The defendants severally answered, denying the frauds charged against them, and also denying that Woodward ever had any interest in the limited partnership mentioned. Smith, in his answer, specially pleaded the statute of limitations of the State of Missouri, alleging that the purchase of the goods, charged in the bill to be fraudulent, was made February 5, 1861, and that no suit to set aside said sale as fraudulent as to creditors was brought by or for them within five years after the sale was made and possession taken, wherefore the creditors and the assignee are barred of such suit by the statute of November 22, 1855, referred to in the opinion of the court.

Replications were filed; a large amount of testimony was

taken, and on final hearing the bill was dismissed, whereupon the assignee appealed to this court.

Lee & Webster, and *Cline, Jameson & Day*, for the assignee.

Whittlesey & Hamilton for the defendants.

The opinion of the court was delivered by

DILLON, C. J.—In the argument at the bar counsel differed, not indeed respecting the general nature of the bill, but upon the point whether in the relief sought it embraced the real estate conveyed by the bankrupt to the respondent, Smith, as well as the personal property or the interest in the co-partnership firm therein mentioned.

The point is important, for the limitation as to real actions is ten years, and as to personal actions five years. The present bill was exhibited more than five, but within ten years after the sale of the goods and the conveyance of the real property.

If the averments of the bill and the prayer for relief be carefully examined, it is plain, beyond controversy, that all that is alleged respecting the real estate is in the nature of inducement, to show the character of the dealings between Woodward and Smith, and to make probable the *gravamen* of complaint.

It is extremely important that we shall obtain a correct notion of the real nature, scope and purpose of the bill; for upon the view we take of this will depend, as we shall presently see, the question whether the statute of limitation bars the relief sought.

The bill is not one to set aside as fraudulent the sale of the specific stock of goods made in February, 1861, or to recover their value as property to which the creditors of the bankrupt are entitled. This sale is indeed set out in the bill, and is alleged therein to have been fraudulent, but it is set forth only as inducement, as the initial transaction of a fraudulent conspiracy and scheme, which ended, not with the consummation of that particular sale, but which continued in existence and was flagrant down to the period when Woodward was adjudicated a bankrupt, and when the suit was commenced.

The plea of the statute sets out this sale made in February, 1861, and then alleges that the suit is barred by reason of the lapse of more than five years before it was commenced. The

plea misconceives the nature and purpose of the bill, and proceeds upon the mistaken notion that it is brought simply to impeach the original sale of the stock of goods made more than seven years before.

The true view of the bill is, that it charges that the real parties in interest in the business of the limited partnership carried on in the name of the defendant Gray, are Woodward and Gray, and not Smith and Gray, as appears on the face of the written and recorded articles, and as given out by all three of them to creditors and the world, and consequently that the interest of Woodward in this business and in the assets of the firm belongs to the assignee for the benefit of his creditors, and it is this interest which the assignee by the present suit is seeking to recover.

The suit is a personal, as distinguished from a real, action, and hence the ordinary limitation period is five years, and not ten, from the time when the cause of action accrued: *Robb* v. *Woodward*, Supt. Ct. Mo. March T. 1870.

In the case just cited the Supreme Court of Missouri decided upon the proof before it, that the conveyance of the real estate by Woodward to Smith was fraudulent, and of the correctness of that judgment on this point there can be no question. That case had no relation to the personal property or partnership interest now in controversy, and there was no question as to when the fraud was discovered, and hence what is said in the opinion on these subjects by way of argument by the learned judge who delivered it, is not to be taken as points decided by the court.

Upon the proofs in the record now before us we consider the fraudulent conspiracy between Woodward and Smith, charged in the bill, to be so clear as not to admit of fair debate, and that so far from ending with the purchase of the goods in 1861, it continued down to the time this bill was brought. The evidence is voluminous, and it would require too much time without any resulting benefits, to enter upon a detailed or analytical statement and discussion of it.

Suffice it to say, that it firmly establishes that Woodward designed to place the property beyond the reach of his creditors,

that Smith made a colorable purchase of the goods to enable the debtor to affect his purpose; that apparently he has received from the sale of the goods in the store all sums which he expended in buying claims against Smith or otherwise; that Woodward was all the time the real, while Smith was only the nominal, party in interest. That the purchase of the stock of goods by Smith was fraudulent is very faintly, if at all, denied by counsel. At all events they have placed the stress of their defense upon the statute of limitation, and it was upon this ground, undoubtedly, that the bill was dismissed by the learned judge whose decree we are called upon to review.

The question involved is alike interesting and important. To determine it, we must first look at the statute and ascertain its meaning and purpose, and then at the special character of the case in hand, and see whether it is one where the statute will operate to bar the relief sought. In a suit of this kind the assignee is clothed with all the rights of creditors (whom indeed he represents) to impeach transfers of property made by their debtor or colorably held by others in fraud of their rights.

The code of Missouri declares that "there shall be but one action in the State for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be denominated a civil action": 2 Wagner's Stat., 991, § 1.

The statute of limitations (section 8) enacts that "civil actions other than those for the recovery of real property can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued."

"Sect. 10, within 5 years; fifth, an action for relief on ground of fraud—the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party at any time within 10 years of the facts constituting the fraud": Id. 918.

Unless Congress has otherwise provided, State statutes of limitation are applied to controversies in the courts of the United States with the same effect as they would be if the controversy were pending in the courts of the State.

It is necessary, therefore, to construe the tenth section of the statute of limitations above quoted, in order to determine its effect upon the rights of the parties to the present suit.

We have had called to our attention no decision of the highest court of the State construing this statute in respect to the *precise* questions which we are now to decide. The legitimate office of construction is to ascertain the legislative will or purpose; and to this end it is not only proper, but often necessary, to look not simply at the language of the particular enactment under consideration, but also at the subject matter of it, in the light which the former law or general principles shed upon it.

Formerly, in the State of Missouri, the forms of action and modes of procedure were as at common law, with a distinct equity jurisdiction. At that time the statutes of limitations were, in substance, the same as 21 Jac. 1. c. 16, and professed to apply only to certain specified actions at law: Rev. Stat., 1845, p. 373, 374.

Equity at this time applied, of course, these statutes according to the settled doctrines of that court.

The code subsequently enacted provided, as we have seen, that there should be but "one form of action"—"a civil action;" and the legislature made the statute of limitations apply to all civil actions; which statute would probably be held in this State, as it has been in others under legislation of a similar character, to embrace equitable as well as legal causes of action so far as they fall within the terms of the act. That is, the limitations as to all actions therein mentioned and provided for, applies equally to causes of action formerly cognizable either in equity or at law: *Newman* v. *De Lorimer*, 19 Iowa 244; *Johnson* v. *Hopkins*, Id. 49; *McNair* v. *Lott*, 25 Mo. 182.

In this view it is easy to perceive why the legislature adopted the 10th section of the act concerning the limitation in cases of fraud. If the provision had been *merely* that "actions for relief on the ground of fraud should be commenced within five years after the cause of action accrued," it is extremely probable that the courts would have been obliged to have held that the statute would begin to run from the period when the fraud was consummated, and not as under the well-known equity rule, from the period when the fraud was or should have been discovered. To remove all doubt on the point, and to preserve the equity doctrine on the subject, the legislature

added the words: "The cause of action in such case shall not be deemed to have accrued *until the discovery by the aggrieved party* * * * *of the facts constituting the fraud.*"

In my judgment, the legislature by this provision, in substance re-enacted the doctrine which had been established by courts of equity, as to the effect of fraud in preventing the running or operation of statutes of limitation.

If this be so, it becomes important to examine the nature and grounds of the equity doctrine, the better to understand the meaning of the statute.

Mr. Justice STORY states the doctrine of equity thus: "If a party has perpetrated a fraud which has not been discovered until the statutable bar may apply to it at law, courts of equity will interfere to remove the bar out of the way of the injured party." (Eq. Jurisp. section 1521). "The question often arises in cases of fraud or mistake, * * under what circumstances and at what time the bar of the statute begins to run." * * "In cases of fraud and mistake, it will begin to run," he says, "from the time of the discovery of such fraud or mistake, and not before:" Id., section 1521 a.

This distinguished jurist, on the circuit, in the Supreme Court, and in the preparation of his commentaries, had frequent occasion thoroughly to explore this subject, and his opinions upon it are entitled to great consideration, though it is to be regretted that he does not go more into detail. In his commentaries, he does not discuss the nature of the fraud which in equity will prevent the bar of the statute from running; nor what, in view of that court, will amount to a discovery of the fraud. An examination of these topics, as well as of the ground and reason of the rule itself, is essential to a thorough understanding of the subject, and is required by the circumstances of the cause now before us for determination.

As to the kind of fraud contemplated: Some judges have said that the fraud which will avoid the effect of the statute of limitations must be positive and actual fraud. But this is a point which we are not now required to notice, for in this case the fraud was actual and positive.

It seems to me quite clear, both from an examination of the

authorities and the nature of the case, that the fraud which shall operate to displace the statute or prevent its application is secret or concealed fraud, a fraud unknown to be such to the party injured thereby. In a leading case on the subject Lord REDESDALE said: "That as fraud is a secret thing, and may remain undiscovered for a length of time, during such time the statute of limitations shall not operate; because, until discovery the title to avoid it does not completely arise, etc. Pending the concealment of the fraud, the statute ought not in conscience to run," etc.: *Hovendon* v. *Lord Annesly*, 2 Sch. & Lef. 624.

That the fraud must be secret or concealed, not openly known and visible, to prevent the bar of the statute from running is distinctly asserted or assumed in many cases: *Troup* v. *Smith*, 20 John. R. 33, 47, 48, per SPENCER, C. J.; *Stearns* v. *Paige*, 7 How. 819, 829; *Carr* v. *Hilton*, 1 Curt., C. C. R. 230; S. C., Id. 399; *McLain* v. *Ferrell*, 1 Swan, Tenn. 48, *Bucknor* v. *Calcote*, 28 Mississ. 432; *Wilson* v. *Joy*, 32 Id. 233; *Cook* v. *Lindsey*, 34 Id. 451; *Young* v. *Cook*, 30 Id. 320 *Campbell* v. *Vining*, 25 Ill. 525; *Farnum* v. *Brooks*, 9 Peck 212; *Phalen* v. *Clark*, 19 Conn. 421; *Moore* v. *Greene*, 2 Curt. C. C. R. 202; affirmed 19 How. 69, 72; Angell on Limit. ch. XVIII.; Sugden on Vend. 612 pl. 17.

It is declared, indeed, that no case can be found where the statute has been avoided, at law or in equity, unless on the ground of fraudulent concealment on the defendant's part: *Bishop* v. *Little*, 3 Greenl. Me. 405.

This subject was discussed by a truly great judge in the case of *Carr* v. *Hilton*, above mentioned, which was a suit in equity, by an assignee in bankruptcy, to recover of the defendant lands fraudulently conveyed to him by the bankrupt. The defendant relied on the statute of limitations found in the bankrupt act of 1841. In holding that the cause of action did not accrue to the assignee till the fraud was discovered, CURTIS, J., says: "Statutes of limitation do not run in cases of fraud while it is secret. It is objected that the bill does not contain any averment that the case of action was fraudulently concealed. But it does state a case of secret fraud, and it would be difficult to distinguish this from fraudulent conceal-

ment. A secret, or what is the same thing, concealed fraud, is a fraudulent concealment of the cause of action." This I assent to as a perspicuous and accurate statement of the law on this point.

As to what amounts to a discovery within the meaning of the equity rule: This is regarded as so important that it must, with all necessary circumstances, be distinctly stated in the bill.

GRIER, J., speaking of this point when delivering the opinion of the Supreme Court, says: "Especially must there be a distinct allegation as to the time when the fraud was discovered, and what the discovery is, so that the court may see whether, by the exercise of ordinary diligence, it might not have been before made:" *Carr* v. *Hilton*, 1 Curt. C. C. R. 390; *Fisher* v. *Boody*, Id. 206; *Moore* v. *Green*, 2 Id. 202, 206; S. C. 19 How. 69. And the bill, it has even been said, should negative laches in not making the discovery: *Mayne* v. *Griswold*, 3 Sanf. 463; *Field* v. *Wilson*, 6 B. Mon. 479.

The question recurs, however, *What is discovery?* I answer, *notice of the fraud;* or, in the language of the Missouri statute, of "the facts constituting the fraud." What is notice? In answering this, Judge CURTIS, in *Carr* v. *Hilton*, 1 Curtis, C. C. R. 390, 393, quotes and approves the following doctrine laid down in *Kennedy* v. *Green*, 3 Mylne & Keen 719, 721, 722: "It is a well established principle that whatever is notice enough to excite attention and put the party upon his guard, and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it."

The cases quite generally hold that the statute will run and fraud will not avoid it, if the plaintiff, under all the circumstances, has been guilty of negligence in discovering or attacking it: *Smith* v. *Talbot*, 18 Texas 774; *McDonald* v. *McGuire*, 8 Id. 361, 370; *Campbell* v. *Vining*, 25 Ill. 525; *Ferris* v. *Henderson*, 12 Penn. St. 49; *Johnson* v. *Johnson*, 5 Ala. (N. S.), 90; *Bucknor* v. *Calcote*, 28 Miss. 432; *Edmonds* v. *Goodwin*, 28 Geo. 38; *Lott* v. *De Graffenreid*, 10 Rich (Eq.) 348; *Farnum* v. *Brooks*, 9 Peck 212; *Way* v. *Cutting*, 20 N. H. 187; *Steans* v. *Paige*, 7 How. 819, 829; *Edwards* v. *Gibbs*, 31 Miss.

Angell on Lim., sec. 183, and note, sec. 190; *Nudd* v. *Hamblin*, 8 Allen (Mass.), 130, and cases cited.

It is easy, it seems to me, to press this principle too far, and I prefer the test or doctrine approved and applied by Judge CURTIS, *i. e.* holding the plaintiff to know all that the information he is possessed of makes it his duty, as a reasonable man, ordinarily vigilant in protecting his own interests, to know or to learn.

The language of the statute is "discovery by the aggrieved party at any time within ten years, of the facts constituting the fraud." This is the same, in my opinion, as if it read discovery of the fraud. If a party knows the facts constituting the fraud, he knows the transaction to be fraudulent. It is not enough simply that he is aware of the fact of the transfer, but he must know "the facts" which make that transfer fraudulent.

In *Godbalt* v. *Lambert*, 8 Rich. Eq. 155, 164, where an alleged fraudulent deed was placed on record, and it was contended that creditors were bound to know its character, the chancellor very sensibly observed, "registry of a deed is only implied notice of its contents, and not of any fraud that may be perpetrated in its execution." I cannot assent to the correctness of the remark in the case of *Lott* v. *De Graffenreid*, 10 Id., 346, that the registry of a deed is sufficient notice to creditors, and the statute of limitations begins to run from that period, even though the deed be fraudulent.

There is one peculiarity of the Missouri statute which ought not to be passed without notice, and that is the clause which renders it necessary to make the discovery of the fraud within ten years. The language of the section was evidently copied from the New York code, which is literally the same as the Missouri statute, except that in New York the words "at any time within ten years" are omitted: Howard's N. Y. code, sec. 91. The same words are omitted likewise from the Ohio code, the Nebraska code (St., 1857, p. 295), the Kansas code (St., 1868, p. 633), the Minnesota code (St., 1866, p. 451), and the Iowa code (Rev., 1860, sec. 2741). All these statutes enact that in actions for relief on the ground of fraud, "the cause of action shall not be deemed to accrue until the discovery of the

fraud," or of the "facts constituting the fraud." Words limiting the time when the discovery shall be made are, so far as I have observed, peculiar to the legislation of Missouri.

Lord ERSKINE, in one case, declared that "No length of time can prevent the unkenneling of a fraud:" Forrester 66. Lord NORTHINGTON said, with emphasis, in *Alden* v. *Gregory*, 2 Eden 285, "Never, while I sit here, will delay purge a fraud." These expressions of decisive indignation against fraud are natural enough indeed, but if taken literally they lay down a doctrine which, if fully carried out, would be at war with the peace and repose of society, on which rests the wise policy of all limitation statutes. Hence the provision very generally adopted in the legislation of the States that the statute will begin to run from the period when the fraud is discovered, and hence, also, the additional provision of the Missouri statute, which seems to require the discovery to be made within ten years from the consummation of the fraud.

The effect of this provision is, not to declare that the plaintiff cannot for a period of ten years be guilty of laches, or that he may for full ten years shut his eyes to facts which it would otherwise be his duty to notice and act upon, but its effect, rather, is to require him, at his peril, to make the discovery within the prescribed period. I do not doubt that the provision is wise in conception, and will prove salutary in operation.

The *reason or ground of this rule in equity* is quite plain. Applying, as this rule does, only to cases of secret or concealed, as distinguished from known fraud, as before explained, I have no doubt that Lord REDESDALE gives the true reason for its adoption by equity, viz.: that it is against conscience for a party to avail himself of the statute when by his own fraud he has prevented the other party from knowing or asserting his rights within the period prescribed by the statutes of limitation: 2 Sch. and Lef. 634: *Troup* v. *Smith*, 20 John. 33, 47, 48.

This is entirely consistent with the exposition of the rationale of the doctrine by Baron ALDERSON in *Brookshank* v. *Smith*, 2 Young & Coll. 68: "In cases of fraud courts of equity hold that the statute runs from the discovery because the laches of the plaintiff commences from that date, on his acquaintance

with all the circumstances. In this courts of equity differ from courts of law, which are absolutely bound by the words of the statute:" *Imp. Gas, &c., Co.* v. *London Gas Light Co.*, 26 Eng. Law and Eq. 425.

So in cases under the Missouri statute: the limitation begins to run as against the plaintiff when he has knowledge of facts which would have impressed a reasonable man with the belief that the transactions were fraudulent, for from that time his laches begin, if his debt is mature.

Judge CURTIS, in the case before cited, speaking of the ground of the rule that fraud avoids the statute, says: "In my judgment the most reasonable and sensible ground is that, substantially, the title to avoid it does not arise until the fraud is known: 1 Curt. C. C. R. 230. This is adopting the view of Lord TALBOT, Cas. t. Talbot 63, and it has also the sanction of other eminent judges.

The title to avoid the fraudulent transaction does ordinarily arise as soon as the fraud is perpetrated (26 Eng. Law and Eq. 425, J. J. Marsh 445; 33 Mississ. 233; 20 Johns 33 supra); but *substantially* it does not, because the fraud is not known, and hence the fraudulent wrongdoer is stopped, while the aggrieved party is kept ignorant of his rights, from setting up against him the bar of the statute.

But this assumes that the creditor's debt is one that is due, so that he is in law enabled effectively to assert his rights, and therefore properly chargeable with negligence if he fails for the prescribed period to do so.

There may be some question as to the scope of the language of the statute, "an action of relief on the ground of fraud;" but there is no doubt that a bill in equity by a creditor to set aside a fraudulent conveyance to transfer of property by his debtor, in such an action. The cases before cited will show that this point has never been disputed.

Having thus seen that the present suit is one which falls within the aforementioned tenth section of the limitation act; that the fraud comtemplated by that Act is fraud which is secret or concealed, as distinguished from that which is open and known; and having also seen what, in view of a court

of equity, is regarded as a discovery of the fraud, so that thenceforth the laches of the plaintiff and the running of the statute alike begin; that the ten years' limitation in the section is not to be construed as sanctioning negligence or the shutting of eyes to information of the fraud; and having also seen the reason, or policy and purpose of this legislation, we are now prepared to apply the statute, as thus expounded, to the facts of the present cause. This, in view of the length of this opinion already, we must do briefly.

The facts constituting fraud in the transfer of property by a debtor, are, in some cases, concealed or secret, and in some visible or open. The fraud in the sale of the stock of goods to Smith, in February, 1861, in view of the relationship of the parties, of facts known to a great many creditors as to Woodward's condition, and Smith's knowledge of it, and the manner in which Woodward was still allowed to exercise control over the property, was such, in our judgment, that any creditor might, if ordinarily vigilant, have discovered it within five years from its sale.

If the present was a bill simply to have declared fraudulent the sale made in 1861, we should have to hold, taking all the circumstances together, that the fraud was not so concealed or secret but the creditors, using due diligence, might and should have discovered it, and if their debts were due, could and should have assailed it within the five years. Undoubtedly, it was this view of the case which was taken in the court below.

But, as we have before shown, such is not the case made by the bill, and such is not the relief sought. The question before the court is, whether, upon the proofs, Woodward has any interest in the limited partnership carried on in the name of the respondent, Gray; whether Smith or Woodward is the party really owning the interest other than that owned by Gray.

Upon this subject we entertain a very decided conviction, and that is, that Smith has no real and substantial interest therein; has apparently no money invested in it beyond what he has received; that his pretense of ownership is purely sham; a device to keep at bay the creditors of Woodward; and that the latter, though held out simply to be a clerk, is the

owner of the interest in the firm, other than that held by Gray. Since 1861, Woodward has, in effect, been managing the store the same as before, giving to it his time, attention and skill; to these, and the profits which are their product, his creditors, and not Smith, are best entitled.

Equity looks at substance and not form. It penetrates beyond externals to the substance of things; and it accounts as nothing, and delights to brush away barricades of written articles and formal documents when satisfied that they have been devised to conceal or protect fraud.

The fraud in the case before us, as we view it, ended not with the purchase of the goods in 1861, but continued down to the time this bill was filed. The case is different from what it would be if the sale of the goods had been the only transaction, and Smith had taken exclusive possession of them and held or sold them as his own more than five years before his purchase was attacked by creditors.

It is our opinion that the fraud, commenced in 1861, has been continued down to the time this suit was brought; that in equity, as respects creditors, the interest in the firm and its business is owned by Woodward and not by Smith; that the latter holds that interest, whatever it may be, in secret trust for the former, and hence the statute of limitations cannot avail to prevent that interest from being ascertained and subjected to the claims of creditors of the bankrupt.

It is not necessary in this view to consider the point made that at all events the statute could not bar the relief sought, at least not entirely, because the debts of some of the creditors of Woodward did not fall due until 1867.

We now decide two points only: First, That Woodward has an interest in the property and assets of the firm business carried on in the name of Gray, which may be reached by the assignee in the present suit. Second, That the statute of limitation, pleaded by the respondent, Smith, is no bar to the relief sought.

The decree of the District Court is reversed.

KREKEL, J., concurred.